

2003

Aqua Massage, LLC Hartford Twin City Fire Insurance v. Utah Labor Commission, Robert B. Higgins : Reply Brief

Utah Court of Appeals

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Case No. 20030965-CA

Agency No.: 20000807

IN THE UTAH COURT OF APPEALS

AQUA MASSAGE, L.L.C. and/or HARTFORD/TWIN CITY FIRE INSURANCE,
Respondents/Appellants,

vs.

UTAH LABOR COMMISSION and ROBERT B. HIGGINS,
Petitioners/Appellees.

APPELLANTS' REPLY BRIEF

Appeal from the Utah Labor Commission
Honorable Donald L. George

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ARGUMENTS

POINT I

THE CORRECT STANDARD OF REVIEW IN THIS CASE DOES NOT REQUIRE RESPONDENTS TO MARSHAL THE EVIDENCE IN FAVOR OF THE ORDER WHEN RESPONDENTS ARE NOT CHALLENGING COMMISSION'S FACTUAL FINDINGS

The Appellee/Petitioner Robert B. Higgins (hereinafter "PETITIONER") stated that Appellants/Respondents Aqua Massage and/or Hartford/Twin City Fire Insurance (hereinafter "RESPONDENTS") did not marshal

all the evidence in support of the Order, they reference only some of the relevant facts and assert that this was, therefore, merely a case in which [PETITIONER] was injured on a normal drive from home to his workplace, where he was scheduled to work on the day of the collision.

(Brief of Appellee, Page 11).

PETITIONER misstates the standard of review when a party is claiming the Labor Commission (hereinafter the "Commission") misapplied the facts to the law. PETITIONER posits that RESPONDENTS must marshal all the evidence in support of the Order. RESPONDENTS, however, are not challenging a factual finding of the Commission. Instead, RESPONDENTS maintain the Commission misapplied the facts to the law in making its determination that PETITIONER's injuries occurred within the course and scope of his employment. (R. 67-69).

The Commission found that PETITIONER's injuries arose out of the course and scope of his employment. (R. 66-70). This Court must uphold the Commission's determination that his injuries arose out of the course and scope of employment, "unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under section 63-46b-16(h)(i)." (AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, ¶ 7, 996 P.2d 1072, *cert. denied* 4 P.3d 1289 (Utah 2000)). Nowhere has this Court or the Utah Supreme Court

stated this standard requires a marshaling of the evidence in favor of the Commission's Order. (See generally, AE Clevite, Inc., 2000 UT App 35, 996 P.2d 1072).

RESPONDENTS maintain the Commission misapplied the law to the facts in this case. Specifically, the Commission ruled that the "coming and going" doctrine is "inapplicable when the travel which gives rise to the accident is an integral part of the work itself." (R. 68). The Commission further held that it was PETITIONER's "duty to transport merchandise from his home to [RESPONDENTS'] store locations, to travel between the sales, locations, and to travel for other business purposes such as depositing sales receipts." (R. 68).

Based upon these duties, the Commission found that PETITIONER's "work-related travel was, therefore, the 'condition' out of which his accident and injury arose." (R. 68). Furthermore, the Commission determined that PETITIONER's "automobile accident occurred while he was rendering a service to his employer, or at the very least was engaged in an activity that was necessarily incidental to his employment." (R. 68). Accordingly, the Commission determined that PETITIONER's injuries "arose out of and in the course of [PETITIONER's] employment . . ." (R. 66-70).

The Commission based the award of workers' compensation benefits on PETITIONER's overall job duties rather than what the PETITIONER was scheduled to do at the time he left his home on the morning of the accident. Consequently, RESPONDENTS submit that the Commission abused its discretion in holding the PETITIONER's injuries occurred within the course and scope of his employment. Furthermore, RESPONDENTS submit that benefits should be denied based on the coming and going rule as PETITIONER was merely traveling from his home to his scheduled shift at the Fashion Place Mall kiosk, which is not within the course and scope of his employment.

POINT II

ANY CITATION TO ALJ'S ANALYSIS AND DECISION IS MISPLACED AND SHOULD BE DISREGARDED AS THE COMMISSION IS THE ULTIMATE FACT FINDER AND THE COMMISSION'S DECISION IS CONSIDERED CONCLUSIVE

In the Brief of Appellee, PETITIONER cited to the Administrative Law Judge's (hereinafter "ALJ") analysis and conclusion section in support of PETITIONER's argument that the injuries arose in the course and scope of employment. (Brief of Appellee, Page 12). PETITIONER's use of the Administrative Law Judge's analysis is misplaced. PETITIONER argues that "Judge George properly concluded under the facts of this case 'The transit from home office to Fashion Place Mall was merely a movement from one workplace location to another.' " (Brief of Appellee, Page 12; R. 40). The Commission in its Order Denying Motion for Review, however, never adopted Judge George's analysis as it did Judge George's Findings of Fact. (R.66-67).

The Utah Supreme Court has often ruled that the Labor Commission "has the duty and the full power, jurisdiction, and authority to determine the fact and apply the law" in a worker's compensation setting." (*See generally, Esquivel v. Labor Comm'n*, 2000 UT 66, 7 P.3d 777; *see*, Utah Code Ann. § 34A-1-301). Although the ALJ "initially hears the evidence, the Commission is the ultimate fact finder." *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707, 710 (Utah App. 1994) (citations omitted). Finding that the Commission's findings and analysis were conclusive, the Court proceeded to analyze the Commission's decision with no deference to the ALJ's decision. *See, Id.* at 710-711; *see also, United States Steel Corp. v. Industrial Comm'n*, 607 P.2d 807, 811 (Utah 1980).

Accordingly, although the Commission adopted the ALJ's section on Factual Findings, the Commission did not adopt the ALJ's sections regarding Principles of Law, Discussions and

Analysis, or the Conclusions of Law. Instead, the Commission issued its own section regarding its Discussion and Conclusion of Law regarding the analysis and law of this case. The Commission's Findings of Fact, Discussion and Conclusion of Law, therefore, is the final and ultimate decision in this case, unless and until this Court overturns the Commission's ruling. *See*, Utah Code Ann. § 34A-1-303(1)-(2). Consequently, PETITIONER's use and quotations from the ALJ's decision is misplaced and, therefore, should be disregarded.

POINT III

BECAUSE THE COMMISSION NEVER FOUND THAT PETITIONER WAS CARRYING PRODUCT IN HIS VEHICLE FOR USE OR DISPLAY AT THE FASHION PLACE MALL KIOSK ON THE MORNING OF THE ACCIDENT, PETITIONER'S USE OF THIS FACT IS INACCURATE AND MISPLACED

In PETITIONER's statements of fact, PETITIONER cites the ALJ Order and Judge George's Discussion and Analysis. (Brief of Appellee, Page 6). Specifically, PETITIONER states that the Commission adopted the ALJ's Discussion and Analysis section. (Brief of Appellee, Page 7). Furthermore, PETITIONER states the Commission found PETITIONER was carrying product for display to the Fashion Place Mall on the morning of the accident. (Brief of Appellee, Page 7). PETITIONER's claims that the Commission adopted the ALJ's Discussion and analysis and the Commission found the PETITIONER was carrying product to the Fashion Place Mall is misplaced and inaccurate.

As stated in POINT II, above, the Commission is the final arbiter and is the ultimate fact finder with respect to worker's compensation claims. The Commission never adopted the ALJ's Principles of Law, Discussions and Analysis, or Conclusions of Law. Instead, the Commission issued its own section regarding its Discussion and Conclusion of Law regarding the analysis and law of this case. The Commission's Findings of Fact, Discussion and Conclusion of Law, therefore, is the final and ultimate decision in this case, unless and until this Court overturns the

Commission's ruling. (*See*, Utah Code Ann. § 34A-1-303(1)-(2)). Consequently, PETITIONER's statement that the Commission found the PETITIONER to be carrying product to the Fashion Place Mall kiosk on the morning of the accident is inaccurate. (Brief of Appellee, Page 7).

In the instant case, the Commission adopted the ALJ's findings of fact. (R. 66). The Commission did not adopt the ALJ's Principles of Law, Discussions and Analysis, or Conclusions of Law. (R. 67). Neither the ALJ's Findings of Fact section, which PETITIONER's attorney drafted, (R. 32-34), nor the Commission's Findings of Fact section mention that PETITIONER was carrying product that he needed to set up or display at the Fashion Place Mall kiosk on the date of the accident. (R. 38-39; R. 66-67). Nowhere in the Findings of Fact of the ALJ or the Commission was it established that PETITIONER was carrying product in his car for the immediate display at the Fashion Place Mall kiosk. Consequently, PETITIONER's attempt to include a fact not included in the Findings of Facts by the ALJ nor adopted in the Findings of Fact by the Commission is misplaced and should be disregarded.

POINT IV

BECAUSE PETITIONER WAS TRAVELING TO HIS REGULAR SCHEDULED SHIFT, AND NOT BETWEEN WORKSITES, THE LABOR COMMISSION SHOULD HAVE APPLIED THE COMING AND GOING RULE TO THE FACTS OF THIS CASE

PETITIONER stated in his Brief of Appellee that Utah case law establishes that when "an employee is injured while traveling between a true 'home office' and another worksite for the same company, he is entitled to compensation." (Brief of Appellee, Page 13). The Labor Commission did not find that PETITIONER's home was a second office location or worksite. (R. 66-70). Rather, the Commission determined that "travel was essential part of

[PETITIONER]’s employment,” and “[PETITIONER]’s work-related travel was, therefore, the ‘condition’ out of which his accident and injury arose.” (R. 68). The Commission further stated that because the accident occurred while PETITIONER was driving, and the driving was a condition of employment, the PETITIONER was within the course and scope of employment. (R. 68).

PETITIONER argues that he was within the course and scope of employment because he traveled from his home, which he argues was his home office, and his regularly scheduled shift at another store location. (Brief of Appellee, Pages 13-22). The Commission, however, never determined that the PETITIONER’s home was a home office; instead, the Commission found that PETITIONER generally had to transport merchandise from his home to various store locations. (R. 68).

The cases cited by PETITIONER are distinguishable from the facts of the instant case. In State Insurance Fund v. Industrial Commission, 15 Utah 2d 363, 364, 393 P.2d 397, 398 (1964), it is true that the employee, the owner and president of a corporation, maintained a regular business office on one side of town, and owned two apartments on the other side of town. The employee used one of the apartments for business purposes and used the other apartment for his personal residence. (*Id.* at 398). On the morning of the accident, the employee was found to have conducted business in the office apartment, returned to his home apartment, and left shortly thereafter. (*Id.*). The Court found that the employee had a promotional device for use of his business in the trunk of his car and the employee’s employer paid for the insurance, gas and oil for the automobile in which the employee was driving on the morning of the accident. (*Id.*).

In State Insurance Fund, the Court found that the employee had visited his work apartment before leaving the apartment to eat breakfast and before continuing on to the other

side of town where he was to continue working on his business. (*Id.*). The Court found the employee to be within the course and scope of his employment because he was traveling not from one location to the next, but from one of the employee's business offices to the other business office. (*Id.*).

In this case, PETITIONER did not leave his home to visit another office; instead, he made one entry on his family home computer at 7:30 a.m. (R. 67). There was no other indicator of the PETITIONER's activities until the accident occurred at 9:47 a.m. (R. 67). The PETITIONER was scheduled to work his regularly scheduled shift. (R. 67). PETITIONER was not going to another business office, as was the case in State Insurance Fund; instead, PETITIONER was leaving to work his regularly scheduled shift as any other employee. The employee in State Insurance Fund left one business office to continue working at another business office.

In the instant case, on the morning of the accident when PETITIONER left his house, he was no longer acting in his capacity as a manager, but as a regular employee driving to his place of employment to work a scheduled shift. The Court in State Insurance Fund recognized that this scenario would not be compensable. (15 Utah 2d 363, 365, 393 P.2d 397, 398). Because PETITIONER did not leave one business office to continue the same work at another business office, PETITIONER was not within the scope and course of his employment and, therefore, the going and coming rule should apply.

In A.E. Clevite v. Labor Commission, 2000 UT App 35, 996 P.2d 1072, the employee was found to be within the course and scope of employment because he worked solely from his home and he was injured at home. (*Id.* at ¶ 2). The employer, an automotive supply company, did not have an office in Salt Lake City and explicitly authorized him to work from his home as a

base of operations. (*Id.*). On the morning of the accident, the employee made some sales calls, returned home to his business office, loaded his car with business materials, and waited for the mailman to bring the last large package for a sales call. (*Id.* at ¶¶ 2-3). While waiting for the package, the employee decided to spread salt to prevent slipping when he slipped and sustained severe injuries. (*Id.* at ¶ 3). This Court found that the injury occurred at the employee's regular place of work while he was attempting to remove an obstacle to his business and, therefore, compensation was warranted. (*Id.* at ¶ 10).

In the instant case, PETITIONER's home was not PETITIONER's regular place of work. The Commission determined that the PETITIONER received product at his home, would occasionally use the computer, and would occasionally make phone calls from his cell phone while at home. (R. 66-67). The Commission, however, did not determine that PETITIONER's home was his central business location or his regular place of work. (R. 66-70). Moreover, the facts of AE Clevite are distinguishable because it was the sole place of employment and the employee conducted all of the business for the company out of his home. In the instant case, there were numerous locations and RESPONDENTS' regular place of work was located at RESPONDENTS' owner's home, not PETITIONER's home. Consequently, this case is not on point as the facts are dissimilar.

Likewise, in Kinne v. Industrial Commission, 609 P.2d 926, 927 (Utah 1980), the employee was found to be within the course and scope of his employment when the employee traveled from his home, where he maintained the vehicle, to his employer's place of business to pick up a trailer to complete the final portion of his trip. PETITIONER attempts to liken his case to that of the employee in Kinne by stating "that 'going and coming' rule did not apply and that

he was acting within the course and scope of his employment while driving from his home (another worksite) to his employer's business location." (Brief of Appellee, Page 16).

Kinne, however, is distinguishable from the facts in this case. In Kinne, the employee's occupation was that of a truck driver who was responsible to maintain and repair his truck while he was at home. (Kinne, 609 P.2d at 927). During a trip from Colorado to California, the employee stopped at home to make necessary repairs to his vehicle. (*Id.*). On his way to pick up a trailer for the last leg of his overall trip, the employee was in an accident. (*Id.*). It was determined that the accident occurred within the course and scope of his employment because he was not just leaving his home to attend a regularly scheduled shift, but was temporarily stopped at home during his overall trip for his employer and repaired and maintained his vehicle during his temporary stop home. (*Id.*).

In the instant case, PETITIONER was not involved in a temporary stop during an overall trip. PETITIONER left his home on the morning of the accident to work a regularly scheduled shift, just as any other employee would have done. He was not acting in his capacity as a manager on the morning of the accident. Similarly, he was not involved in an overall job wherein he was required to make a temporary stop as the employee in Kinne. Instead, he left his home on the morning of the accident as any other employee heading to their place of employment to work their regularly scheduled shift and, therefore, should not be considered to be within the course and scope of employment.

Likewise, Moser v. Industrial Commission, 21 Utah 2d 51, 54, 440 P.2d 23, 25 (1968) (Ellett and Henriod, JJ., *dissenting*), is distinguishable because the Commission based its decision on the fact that the employee had called his employer and notified him that his truck had stalled. The employer proceeded to give the employee directions on how to start the vehicle.

(*Id.*). While the employee was carrying out the employer's explicit directions the employee was injured. (*Id.*). The Court determined that based upon these facts, the employee was in the course and scope of employment.

PETITIONER also uses non-Utah cases for the position that PETITIONER was in the scope and course of employment when he left his home to attend his regularly scheduled shift. However, these cases, as the cases above, are distinguishable from the facts in the instant case.

In Weimer v. Wei-Munch Limited, 117 A.D.2d 846, 846, 498 N.Y.S.2d 547, 548 (1986), the employee was the president of the corporation as well as its manager and chef. The employee maintained the office of his corporation in his home, where he conducted all the paperwork and telephone work of his corporation. (*Id.*). The court concluded that the employee's home was a second business location because "all business mail was received there, as were all business records, files and adding machine . . . all paper work such as payrolls, merchandise ordering, preparation of menus, employee scheduling and business meetings were conducted at the office." (*Id.* at 847).

After the employee made a night deposit at the bank, he was traveling home when he drove into a ditch and sustained injuries. (*Id.*). The employee recovered because it was found that he was driving on a direct route to his office at home and his car contained material which he was going to work on as soon as he arrived at his home office.

In the instant case, PETITIONER's home was not a business location of RESPONDENTS nor was it considered to be such. The Commission found that he was responsible for delivering product from his home to various store locations. As mentioned in Point III, above, PETITIONER was not carrying product to the Fashion Place Mall kiosk, he was merely traveling to the kiosk to attend his regularly scheduled shift like any other employee.

The other non-Utah cases are also distinguishable. Garcia v. Phil Garcia's Electrical Contractor, Inc., 99 N.M. 374, 658 P.2d 449 (1982) (holding employee was in course and scope of employment because employee owned the corporation and other non-related business, both of which he ran out of his home and was carrying business material in his car to his home at the time of the accident); Bentz v. Liberty Northwest, 311 Mont. 361, 57 P.3d 832 (2002) (holding employee within course and scope of employment when employee was traveling salesman and business explicitly required him to work from home and he was traveling home to continue working when he was injured); Benson v. Colorado Compensation Insurance Authority, 870 P.2d 624 (Colo. App. 1994) (holding employee within course and scope of employment when employee was a traveling home health aide and was traveling between patient homes when accident occurred); Hinojosa v. Workmen's Compensation Appeals Board, 8 Cal.3d 150, 501 P.2d 1176 (1972) (holding that employee within course and scope of employment when employer required employee to travel between ranches during the day and at the employer's direction throughout the day in employee's vehicle). Under these cases, the common thread that runs through them all is the issue of employer control, requiring the employees to either move locations at the employer's direction or requirement. Employer control is not present in the instant case.

PETITIONER's case is different from the cases previously cited, above, because PETITIONER was not involved in an overall project that necessitated his travel to the Fashion Place Mall to complete his project and was not under RESPONDENTS' control. PETITIONER was not called by RESPONDENTS on the day of the accident to transfer job sites. On the day of the accident, PETITIONER left his home to work a regularly scheduled shift at the Fashion Place Mall kiosk. He did not leave RESPONDENTS' established business office where the heart of

the employer's business transactions took place. Instead, he left his home after making a single entry in the family home computer and more than two-hours later was involved in an accident while going to his regular shift. In short, RESPONDENTS did not exercise control over PETITIONER on the morning of the accident at the time PETITIONER left his house.

These facts are distinguishable from the facts of the cases cited by PETITIONER and, therefore, the coming and going rule should be applied to the facts of this case as PETITIONER was merely on his way to regularly scheduled shift when the accident occurred and was not under RESPONDENTS' control.

POINT V

THE LABOR COMMISSION DID NOT FIND THAT PETITIONER'S HOME WAS A BUSINESS LOCATION WHICH IS SUPPORTED BY THE RECORD AND, THEREFORE, PETITIONER DID NOT LEAVE A WORK LOCATION ON THE MORNING OF THE ACCIDENT

PETITIONER repeatedly refers to his home as his "home office" throughout his Brief of Appellee. (Brief of Appellee, Pages 13-25). The Commission never determined that PETITIONER's home was considered to be a "home office" nor did the Commission find the PETITIONER's home to be a business location. (R. 66-70). Although the Commission never found the PETITIONER home to be a "home office," PETITIONER has repeatedly referred to his home as such and, therefore, RESPONDENTS challenge PETITIONER's characterization of the work performed at his home.

PETITIONER's general job duties were scheduling people to work, collecting time cards, delivering the supplies, making sure all of the supplies and inventory was full, delivering supplies and working shifts. (R. 66-70; R. 74, Page 18). PETITIONER used a computer to type up scheduling, which he usually did once per week. (R. 74, Pages 18, 20). PETITIONER also

collected money, deposited money, gathered the sales, and gathered peoples' time cards. (R. 74, Page 19).

When PETITIONER used his computer at home, he testified that he would make work schedules at this home and print them out for the day and for the month. (R. 74, Pages 21-22; R. 74, Page 82). He also claimed to have made tracking reports for weekly sales figures for the company. (R. 74, Page 22). PETITIONER testified that he would also do the tracking reports at RESPONDENTS' corporate office, his brother's house. (R. 74, Pages 23-24).

As to PETITIONER's "home office," PETITIONER testified that of all the items in the room he used for his office he only used the computer and the printer and occasionally the television. (R. 74, Pages 28-31). PETITIONER recognized that RESPONDENTS' office was at the company owner's house rather than at his parents' house where he lived at the time. (R. 74, Page 32). PETITIONER went to RESPONDENTS's office two or three times a week to conduct his updates and his computer work. (R. 74, Page 38). RESPONDENTS's office contained a computer with all the business applications on it for company use. (R. 74, Page 45-46). Although PETITIONER considered his parents' home to be RESPONDENTS's office, (R. 74, Page 39), PETITIONER later acknowledged that RESPONDENTS' base of operations was his brother's office. (R. 74, Page 47; R.74, Page 77).

PETITIONER acknowledged that he did not use the fax machine present in the computer room. (R. 74, Page 48). As to PETITIONER's use of the computer located at his home, PETITIONER testified that he played games on his computer, which was not business related. (R. 74, Page 57). RESPONDENTS' business computer was located at RESPONDENTS' business office which contained RESPONDENTS' complete business files. (R. 74, Pages 58-

59). In fact, PETITIONER's computer use at his parent's home was for his own convenience rather than RESPONDENTS' convenience. (R. 74, Page 59).

PETITIONER further acknowledged that he used his home phone to call his local friends and used his cellular phone to make calls outside of the Tooele area. (R. 74, Pages 48-49). PETITIONER used his cell phone to make his scheduling calls instead of using his home phone or RESPONDENTS' office phone. (R. 74, Page 69-70). PETITIONER made his scheduling calls from his cellular phone while he was at his house so he would not have to drive the hour to RESPONDENTS' business offices and make the calls, which was for PETITIONER's own convenience. (R. 74, Page 69-70). In fact, PETITIONER could make the telephone calls from anywhere because PETITIONER owned and used a cellular phone, which was for his own convenience. (R. 74, Pages 98-101).

In fact, despite numerous attempts at verifying that PETITIONER made telephone calls from his home on his cellular phone, no record indicates PETITIONER made any telephone calls on the morning of the accident. (R. 74, Pages 112-115). Similarly, the work PETITIONER conducted on the computer was to print out a blank schedule and then handwrite times in which the employees had to work. (R. 74, Page 118-119).

In this case, as has been shown by the record, PETITIONER lived with his parents and used the computer at his house. PETITIONER used the computer at his house for his own convenience so as to save the hour drive to RESPONDENTS' offices. On the morning of the accident, there was a single entry on the family home computer. (R. 66-70). Despite PETITIONER's stated custom of calling RESPONDENTS' employee's from his cell phone, there was direct evidence that no calls were placed from PETITIONER's home phone or from his cellular phone.

Upon the facts of this case, the Commission did not find that PETITIONER's home was his home office. (R. 66-70). As evidenced from the facts of this case, above, the Commission's determination was correct and supported by substantial evidence in the record. The facts before the Commission showed that PETITIONER printed out a form schedule, occasionally stored product in his parent's garage, and made calls from his cellular phone regarding employee schedules.

In the instant case, PETITIONER worked out of RESPONDENTS office anywhere between two and three times per week. PETITIONER made calls from his cell phone regardless of whether he was at his home or at RESPONDENTS' office. RESPONDENTS' office contained all the files and programs to run the business while PETITIONER used his computer at home to print out a form schedule for his own convenience or to play computer games. PETITIONER understood that RESPONDENTS' business offices were located at his brother's home, rather than his home.

Consequently, because the Commission did not hold that PETITIONER's home was a "home office," and the Commission determination is supported by substantial facts in the record, PETITIONER's characterization of his home as a "home office" is inaccurate and misplaced.

CONCLUSION

The coming and going rule should apply to the facts of the instant case because RESPONDENTS had no control over PETITIONER at the time of the accident. Furthermore, the Commission did not hold that PETITIONER's home was a home office. Instead, RESPONDENTS office was located at the brother's house and was recognized by PETITIONER to be RESPONDENTS' office. Moreover, PETITIONER did not use his home phone or his

brother's phone to make business phone calls, choosing instead to use his cellular phone for his own convenience and which he could use anywhere and at any time.

In addition, PETITIONER was not under RESPONDENT control on the morning of the accident and was not traveling from one job site to the next. Instead, when PETITIONER left his home he left as any other employee traveling to work from his home. RESPONDENTS neither had control over PETITIONER nor received any benefit from his arrival at work.


From a policy standpoint, PETITIONER used his cellular phone to make phone calls from various locations where RESPONDENTS did not exert control. PETITIONER also conducted his scheduling at various locations. On the morning of the accident, there was direct evidence that the PETITIONER did not make any phone calls and made a single entry on the family computer.

Even if PETITIONER made telephone calls on the date of the accident, PETITIONER made the alleged calls and entry at his home for his own convenience and without RESPONDENTS' supervision or control. The mere fact that PETITIONER allegedly made phone calls and made one entry on the home computer does not place the PETITIONER under RESPONDENTS' control such as to withdraw PETITIONER's case from the coming and going rule. If this was the case, anytime PETITIONER made a phone call or entry on his home computer or PDA, PETITIONER would be considered to be in the course and scope of his employment and could receive benefits regardless of his location.

Consequently, the RESPONDENTS respectfully request this Court reverse the Commission's Order Denying Motion for Review and deny the award of workers' compensation benefits under the coming and going rule.

DATED THIS 12th day of July, 2004.

PLANT, CHRISTENSEN & KANELL


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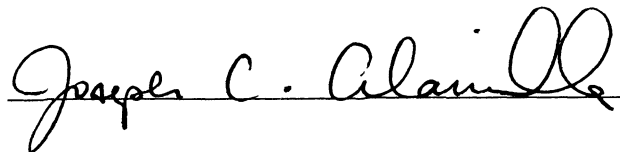
CERTIFICATE OF MAILING

I hereby certify that on the 12th day of July, 2004, a true and correct copy of the Appellants' Reply Brief was served, postage prepaid, via first-class mail on the following:

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ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, an addendum is included herewith.

CASE NO. 20000807

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1 scheduled. If not, then call someone else and fill their
2 spot.

3 Q. Let me just stop you right there. Would the
4 follow-up calls to each person that was supposed to work, did
5 that happen every morning?

6 A. Yes.

7 Q. Okay. And would there be a time that that would
8 happen?

9 A. Between 8:00 and 9:00 in the morning.

10 Q. So then you also just mentioned the computer work.
11 What kind of computer work would you do in the morning as
12 opposed to, say, after work or at night?

13 A. Just like if, say this person -- let's say Danny
14 couldn't -- he was scheduled to work but he couldn't work. I
15 would call Tyler and if I had to change it on the computer,
16 then I'd change it. And then if Danny said he couldn't be
17 there on Tuesday either, then I would change it that way, and
18 print it out that way, and deliver it to the kiosk so they
19 could see it.

20 Q. Was there any other computer work you'd do in the
21 morning?

22 A. Yes, there was.

23 Q. What else would you do?

24 A. I would make the scheduling, like I told you, and
25 then I would also -- for Mike, I would print -- I would print

1 out the daily -- the monthly scheduling for the week. So I'd
2 deliver it to him.

3 Q. Would you do tracking reports?

4 A. Yes, I would. That's what I was trying to say.

5 Q. Tell me what a tracking report is.

6 A. It's like, for the week. Say, like, we made \$200 on
7 Monday, then \$800 on a Tuesday, and \$700 on a Wednesday, and
8 only \$300 on a Thursday, and \$500 dollars on a Friday, then I
9 would print that into the computer -- write it down in the
10 computer, jot it down, and deliver it to Mike the next day at
11 11:00 or that morning. Actually, I did that in the morning.

12 Q. Now, let's see. Let me start --

13 THE COURT: Do we need to mark these separate?

14 MS. ATKIN: That's the same report, Your Honor.

15 THE COURT: The two-page document to be marked as
16 Petitioner's Exhibit 2, P2. Is there any objection to that?

17 MR. KANEL: No, Your Honor.

18 THE COURT: Thank you. P2 will be received.

19 Q. (by Ms. Atkin) It says tracking report at the top.
20 So I'm assuming that this is a tracking report we're talking
21 about?

22 A. Yeah.

23 Q. Can you tell me how to read this? It looks like
24 there are some dates and then there's some numbers underneath.

25 A. Correct.

1 Q. And it doesn't look like -- it looks like it should
2 be a chart that has sales almost hourly.

3 A. Correct.

4 Q. Did you ever do hourly sales?

5 A. I did not. I was not required to do that.

6 Q. So it was just a daily total?

7 A. Yes.

8 Q. Let's flip to page number two. When was the last
9 date this tracking report was updated?

10 A. The 31st of July.

11 Q. So that would have been the sales for the
12 31st of July. So when would you have entered those sales?

13 A. Um, Tuesday morning.

14 Q. Could it have been Monday night?

15 A. Morning, night, yeah.

16 Q. Either, or?

17 A. Yeah.

18 Q. So Monday night or Tuesday morning these would have
19 been entered?

20 A. Yes.

21 Q. Okay. Would you ever go to Mike's house to do this
22 type of work?

23 A. At times, yes.

24 Q. And tell me why you would do that at Mike's house.

25 A. Just for the convenience of not having to drive all

1 the way back home if I had to work, say, a night shift and the
2 next day a morning shift and the schedule needed to be done.

3 Q. Okay. To the best of your knowledge, were you
4 working at Mike's house on July 31st, the day before the
5 accident?

6 A. (Inaudible.)

7 Q. Okay. Now, I understand -- just so the court is
8 clear, as I understand it, basically you'd stay over at
9 Mike's house on those kinds of days?

10 A. Yes, correct.

11 Q. Let's see. Then you mentioned that one of your job
12 duties was delivering supplies. Would that entail going to
13 each of the three malls?

14 A. Yes, it would.

15 Q. And was that a daily --

16 A. Yes, it was.

17 Q. -- event? What kind of supplies were you
18 delivering?

19 A. Just like massage supplies. Like, I had -- we did
20 -- at the time, we did radiators and gas pumps, and the
21 insoles for the shoes, the sole inserts.

22 Q. Okay. Was that something that had to be done every
23 day?

24 A. Yeah.

25 Q. Why is that? Why didn't you just stock more on the

1 **Q.** If you were covering for somebody, you might have to
2 move that?

3 **A.** If I was filling in, yes.

4 **Q.** So you've mentioned a couple of times that you get
5 up about 8:00; is that accurate?

6 **A.** Um, I get up before then, I start work at 8:00.

7 **Q.** Was that every morning you start work at 8:00?

8 **A.** Yes.

9 **Q.** Was that time flexible?

10 **A.** No, it was not.

11 **Q.** Okay. Were you on salary or hourly?

12 **A.** I was on salary.

13 **Q.** So if you didn't start at 8:00, you'd still get paid
14 starting at 8:00; correct?

15 **A.** Correct.

16 **Q.** All right. So why wasn't this flexible? Why
17 couldn't you just start whenever you wanted to?

18 **A.** Well, I'm an honest guy. So to be honest, I would
19 start at 8:00.

20 **Q.** So at 8:00, when you went to work -- when you
21 started work, where would you go?

22 **A.** I would start in the house and do the computer work,
23 and then I would drive my car.

24 **Q.** Don't move forward yet. You'd start in the house
25 and do the computer work. Did you have a special room in the

1 house to do that?

2 **A.** Yes, I did.

3 **Q.** Is that a picture of that room?

4 **A.** It is.

5 **Q.** Why don't you walk through with us what all is
6 there.

7 **THE COURT:** Do you want this marked?

8 **MS. ATKIN:** Oh, yes, if we could. Let's go ahead
9 and mark it.

10 **THE COURT:** The page with two photographs on it
11 marked as Petitioner's No. 3, P3. Any objection to that,
12 Mr. Kanell?

13 **MR. KANELL:** No, Your Honor. I assume he'll just
14 lay foundation and tell us what it is, so --

15 **THE COURT:** Okay. P3 will be received.

16 **Q. (by Ms. Atkin)** All right. Let's start at the left
17 side and just go across and tell me what equipment and things
18 we're looking at here. On the far left side it looks like a
19 screen with plastic around it.

20 **A.** That's a monitor, yes.

21 **Q.** Was that something that you used in the business?

22 **A.** Um, that was kind of like the backup monitor in case
23 the other one broke down.

24 **Q.** So it wasn't being used at the time of this photo?

25 **A.** Not this one.

1 Q. It looks like there's a filing cabinet under it.

2 A. Yes.

3 Q. Was that used for the business?

4 A. No, it wasn't.

5 Q. And then next to that it looks like a long desk.

6 A. Yes.

7 Q. And there's kind of a black thing that I really
8 can't tell what it is in front of the lamp there.

9 A. That's a briefcase.

10 Q. That's a briefcase?

11 A. Yes.

12 Q. Was that a briefcase that you used for --

13 A. No, it was not.

14 Q. -- work? Okay. And then next is a --

15 A. Fax machine.

16 Q. And was the fax machine used for work?

17 A. No, it was not.

18 Q. And next, there's some sort of a file, it looks
19 like.

20 A. Yeah.

21 Q. And was that used for work?

22 A. No, it was not.

23 Q. And a -- what's the little white thing there next to
24 the file, a calculator?

25 A. Um, yes.

1 **Q.** And was the calculator used for work?

2 **A.** Um, no, it was not.

3 **Q.** And then there's a black screen. Is that a
4 television?

5 **A.** Yes.

6 **Q.** All right. And did you use the TV during work?

7 **A.** It was on. I didn't necessarily watch it, I
8 listened to it, kind of like listening to a radio.

9 **Q.** Uh-huh. And then I see a computer monitor.

10 **A.** Yes.

11 **Q.** And was that used for work?

12 **A.** Yes, it was.

13 **Q.** In fact, let's just look at the whole computer. It
14 looks like there's a computer underneath there, a tower, and
15 is that a printer at the end?

16 **A.** A printer.

17 **Q.** Were those things used for work?

18 **A.** Yes, they were.

19 **Q.** So, this was your work space right here?

20 **A.** Yes.

21 **Q.** All right. Was that computer also used for anything
22 other than work stuff?

23 **A.** Um, it was.

24 **Q.** But when you needed to do the tracking report or the
25 scheduling computer work, this is where it was done?

1 **A.** Sure.

2 **Q.** Okay. Did Mike know that you did that?

3 **A.** Yes, he did.

4 **Q.** Did he ask you to please not do that there, to

5 please come to his house instead?

6 **A.** No. He actually suggested I do it at home.

7 **Q.** Okay.

8 **A.** He said that I could either do it at home or in his

9 office.

10 **Q.** And what did he mean by his office?

11 **A.** The company's office.

12 **Q.** And where's that?

13 **A.** At his house.

14 **Q.** At his house?

15 **A.** Yes.

16 **Q.** So, you can do it at your house or at his house?

17 **A.** Yes.

18 **Q.** Okay. On August 1st of 2000, did you start work at

19 8:00?

20 **A.** Yes, I did.

21 **Q.** How do you know that?

22 **A.** I don't.

23 **Q.** Okay. Why don't you know that?

24 **A.** Because --

25 **Q.** No memory of that day?

1 schedule?

2 A. Yes.

3 Q. In opening statements Mr. Kanell said that you are
4 not required to be at work at any particular time. Do you
5 agree with that statement?

6 A. No, I do not.

7 Q. And why is that?

8 A. Just because I had a set schedule.

9 Q. So you had to be at work at --

10 A. At 10:00.

11 Q. 10:00?

12 A. When the mall opened.

13 Q. When did you have to start your day?

14 A. 8:00.

15 Q. Did you go to Mike's on a regular basis to do your
16 updates and computer work?

17 A. For the most part. I mean, I would probably go
18 there once or twice a week, or two or three times a week.

19 Q. And this would be after work?

20 A. Um, yes.

21 Q. Would you ever go to Mike's first, you know, at
22 8:00, leave and go to Mike's to do that morning calling and
23 computer work?

24 A. No, I would not.

25 Q. Was there an office somewhere, say a building, a

1 professional building somewhere, that had an office for Aqua
2 Massage?

3 **A.** No, there was not.

4 **Q.** So the only offices that this company had were in
5 people's homes?

6 **A.** Correct.

7 **Q.** One in Mike's home -- did you consider your home to
8 also be an office for Aqua Massage?

9 **A.** Yes.

10 **MS. ATKIN:** No further questions, Your Honor.

11 **THE COURT:** Cross?

12 **MR. KANELL:** Your Honor, at this time I'd like to
13 release the copy of the deposition of Brad Higgins.

14 **THE COURT:** Any objection?

15 **MS. ATKIN:** That was previously stipulated.

16 **MR. KANELL:** Did you get a copy?

17 **MS. ATKIN:** No, I didn't. That's why I was
18 wondering if you were handing me one. I will take one if you
19 want to hand me one.

20 **MR. KANELL:** I was just going to have Brad read from
21 this and I don't have one for you to read along.

22 **MS. ATKIN:** That's fine, because I have my own. So
23 you're just fine. I'm just kind of wondering, this is the one
24 that I've got and it actually shows where Fashion Place Mall
25 is.

1 days, yes.

2 Q. Okay. And on some of those days do you recall
3 filling in for her?

4 A. Yes.

5 Q. Okay. Now, do you have any memory at all that on
6 the date of July 31st, you were required to work at the
7 Fashion Place Mall that afternoon?

8 A. I do not recall.

9 Q. And do you recall that on the morning of Tuesday,
10 August 1st, that Camille was in class and that she had thought
11 you were working for her?

12 A. I do not recall.

13 Q. Okay. Now, on previous occasions I think you
14 testified that you did go to your brother's house, I think you
15 said once or twice a week, to Mike's to do the computer work.

16 A. Correct.

17 Q. Now, at the time, and I think all the time, the
18 registered office address was 249 South Douglas Street; is
19 that correct?

20 A. Correct.

21 Q. And that's where he had the computer, in his office,
22 that had all of the business stuff on it; didn't it?

23 A. Yes.

24 Q. Okay. And that was more than just the schedule,
25 which has been marked as P2, which is the tracking report, it

1 had a lot of other stuff that was business related on the
2 computer at his home; didn't it?

3 A. Correct.

4 Q. Now, your computer at this office, as I understand
5 it, only had -- well, in fact, this tracking report wasn't
6 even on the computer on a permanent basis, was it?

7 A. Yes, it was.

8 Q. Didn't you have to take a disk and put it in there
9 and bring it up from the disk?

10 A. Um, I don't recall.

11 Q. Have you checked that computer since to see if this
12 is on the hard drive?

13 A. No, I have not.

14 Q. This schedule thing -- as I recall when we took your
15 deposition, you told us that the schedule thing was just a
16 daily schedule where you put names and places on it; is that
17 right?

18 A. Correct.

19 Q. And you would print that off and give it to the
20 people?

21 A. Correct.

22 Q. Now, do you recall if that was on the computer at
23 home or on the computer at your -- I mean, when I say "home",
24 I mean the computer at Mike's home at 249 Douglas, or was that
25 on your computer here out in Erda?

1 **A.** Would you rephrase the question?

2 **Q.** Do you recall the scheduling report was something
3 that was on the hard drive of the computer in Erda or was that
4 a main schedule on the computer at the 249 South?

5 **A.** I don't recall.

6 **Q.** Have you recalled that on occasion when you would
7 work Monday night and have to report also Tuesday morning at
8 one of the kiosks to work that you would stay overnight at
9 Mike's house and do computer work and just sleep there?

10 **A.** Yes, I would.

11 **Q.** And how often do you think you did that, prior to
12 this August 1st date?

13 **A.** Two to three times a week.

14 **Q.** And was that every week?

15 **A.** Yeah.

16 **Q.** Would you classify the address of
17 249 South Douglas Street as the base address of operations of
18 the business?

19 **A.** Yes.

20 **Q.** Now, you had a phone that you used in the business;
21 is that right?

22 **A.** Yes, I did.

23 **Q.** I want you to look at this exhibit which is marked
24 as -- is it 3, Your Honor?

25 **THE COURT:** 3, that's correct.

1 **Q.** **(by Mr. Kanell)** I notice there is a phone in this
2 office with a fax machine on it. Now, you testified that the
3 fax machine was not used for the work; is that right?

4 **A.** Correct.

5 **Q.** I take it that the phone also was not used for work.

6 **A.** Correct.

7 **Q.** In fact, there was a home number at the Erda address
8 that was just registered in your parents' name; isn't that
9 right?

10 **A.** Correct.

11 **Q.** It wasn't registered in your name, it wasn't
12 registered in Aqua Massage's name, and you didn't use it at
13 all for the business?

14 **A.** Not this fax machine phone, no.

15 **Q.** Was that a separate line?

16 **A.** There's -- we have three lines in our house, yes.

17 **Q.** Okay. Were any of those lines registered to
18 Aqua Massage?

19 **A.** No, they were not.

20 **Q.** Okay. Now, I think in your deposition you would say
21 that sometimes you would use your local home phone to call
22 people, if they were local --

23 **A.** Correct.

24 **Q.** -- because some of those guys were just your
25 friends.

1 **A.** Yeah.

2 **Q.** But if you had to call anybody else you used your
3 cell phone; is that right?

4 **A.** Yeah.

5 **Q.** Now, you were not reimbursed at all from the
6 business for your cell phone, were you?

7 **A.** Not that I can recall, no.

8 **Q.** And in fact, you had your cell phone before you went
9 to work for the business?

10 **A.** Yes.

11 **Q.** And you used your cell phone for personal things?

12 **A.** Correct.

13 **Q.** And the reason that you used it in the business is
14 because it was no long distance charge from Tooele?

15 **A.** Correct.

16 **Q.** Because it was under the cell system?

17 **A.** Correct.

18 **Q.** Now, we asked you to check your records of your cell
19 phone, at your deposition, to see if you had any records to
20 show that you had made any calls that morning for the
21 business. You didn't find any records; did you?

22 **A.** I don't recall you asking me to do that, so I did
23 not do that. So, no.

24 **Q.** Well, do you have your records here today?

25 **A.** I do not.

1 too?

2 A. Correct.

3 Q. And in fact, that briefcase and those glasses are --

4 A. Are his.

5 Q. -- are his, not yours; isn't that right?

6 A. Correct.

7 Q. Okay. And the ten-key calculator, that was his too?

8 A. Yes. Well, I --

9 Q. You could use it?

10 A. I could use it.

11 Q. You didn't buy it; did you?

12 A. No, I did not.

13 Q. And the TV, that was just kind of a background
14 thing?

15 A. Yeah.

16 Q. Did you ever just go in there to watch TV, just to
17 be watching it?

18 A. No, I did not.

19 Q. Now, I think you told me in your deposition that you
20 did go in and use the computer for games. You played games on
21 the computer; is that correct?

22 A. Correct.

23 Q. And that was not work related, was it?

24 A. No.

25 Q. You also told me there was a modem on this computer.

1 **A.** Correct.

2 **Q.** Was that modem also connected with the fax machine
3 or was it another separate line?

4 **A.** It was the same line.

5 **Q.** So likewise, it would not have been registered to
6 the business, would it?

7 **A.** No, it would not.

8 **Q.** In fact, I think you told us in your deposition that
9 you did get online using the modem; is that right?

10 **A.** Yes, I did.

11 **Q.** And that was not related to any business?

12 **A.** Well, it was not unless Mike suggested, Maybe look
13 something up on the Internet. No, it was not.

14 **Q.** Okay. Did you have an e-mail address?

15 **A.** Yes, I did -- no, I didn't. No, I did not at the
16 time.

17 **Q.** Okay. There's some phone books up there; did you
18 ever use those in the business?

19 **A.** Um, if I needed to look anything up regarding the
20 business, yes. I mean, I can't off the top of the my head
21 say, Yes, it was; No, it wasn't.

22 **Q.** Do you ever remember actually using those phone
23 books in the business?

24 **A.** No, I don't.

25 **Q.** Now, it's true, is it not Brad, that the complete

1 computer that had all of the business stuff on it was at
2 Mike's home at 249 Douglas Street?

3 A. Yes, it was.

4 Q. And the reason that you had a computer out at your
5 place, besides using it for personal stuff, was for your
6 convenience and not for Mike's; isn't that right?

7 A. Yes, it was.

8 Q. Okay. Now, you indicated that at 11:00 it was your
9 duty to deliver this Exhibit P2 to Mike.

10 A. Okay.

11 Q. Now, Mike does not work in the Aqua Massage
12 business; does he?

13 A. No, he does not.

14 Q. He's just the owner and came up with the financing
15 and those sort of things?

16 A. Correct.

17 Q. His wife was the actual manager; you were the
18 assistant manager. So, does Mike have another job somewhere?

19 A. He does.

20 Q. Where does he work?

21 A. At Gastronomy.

22 Q. So did you have to deliver that to him at Gastronomy
23 or did you just take it up to the 249 Douglas Street address?

24 A. Just to the address.

25 Q. So it really didn't matter if you got it there at

1 **Q.** And who would order those products?

2 **A.** Um, Mike, himself, would order them.

3 **Q.** And so it was -- so, he would decide where they were
4 delivered?

5 **A.** Yes, he would.

6 **MS. ATKIN:** Okay. No further questions, Your Honor.

7 **THE COURT:** Next witness.

8 **MR. KANELL:** Can I just have a few follow-ups?

9 **THE COURT:** Sure.

10 **RECROSS-EXAMINATION**

11 **BY MR. KANELL:**

12 **Q.** You indicated that you had made these phone calls in
13 the morning to people. You also told the judge that two to
14 three times a week you would sometimes stay overnight at
15 Mike's house.

16 Now, when you were at Mike's house, you made the
17 calls from his house; isn't that right?

18 **A.** Um, correct. Well, I mean, it depends on -- if I
19 needed to call Danny, it would have been long distance on
20 Mike's phone to call Danny, so --

21 **Q.** But you'd still use your cell phone?

22 **A.** Yes.

23 **Q.** And you would do that from Mike's house?

24 **A.** Yes.

25 **Q.** You wouldn't go from Mike's house out to Erda so you

1 could make those phone calls and then come back in to work?

2 **A.** No, I would not.

3 **Q.** Would it be accurate to say that the reason you made
4 those calls from your home was for your convenience? Because
5 you could have just as easily been required to come to work at
6 8:00 at Mike's house, make all the phone calls, because that
7 was the principal office, and then go to work at the malls;
8 isn't that right?

9 **A.** That's correct.

10 **Q.** But then you would have had to get up at 7:00 a.m.
11 to travel to get to Mike's by 8:00; isn't that right?

12 **A.** That's right.

13 **Q.** This way all you had to do was get up at 8:00 a.m.,
14 call from your cell phone, if you made those calls, and then
15 go to work?

16 **A.** Correct.

17 **Q.** So, that was for your convenience and not Mike's?

18 **A.** Correct.

19 **Q.** Now, this hard drive, you've still got that computer
20 in your house; have you not?

21 **A.** Yes, we do.

22 **Q.** And you haven't brought anything here today to show
23 that that hard drive has anything that you would have been
24 working on?

25 **A.** I did not.

1 your computer?

2 A. No, it was at his house.

3 Q. Okay. And would that surprise you that Brad was
4 working at 7:30 in the morning?

5 A. No. He jogged. He would get up and go jogging and
6 then work on the computer. I don't know when he worked on
7 them, you know, I can't say that he worked on them all the
8 time, and I didn't really care. I was just --

9 Q. Okay. Let's see. I'm trying to figure out how best
10 to phrase this. How did you feel about Brad doing this kind
11 of work at his house as opposed to coming to your house at
12 8:00 in the morning and doing it at your house?

13 A. It didn't matter to me.

14 Q. Okay.

15 A. Honestly, I didn't say either way whether -- when he
16 did it, or where.

17 Q. Did you know that he was doing it at his house?

18 A. Yeah. I set up the file and put it on the computer
19 so that he would do it there.

20 Q. So, you actually went to his house and set up the
21 computer to make it work?

22 A. Yeah. When I set up the computer up I put
23 everything on that he needed to do the work.

24 Q. You mentioned that one of his job duties was the
25 calls and the scheduling. Was that something that he was to

CROSS-EXAMINATION

BY MR. KANELL:

Q. Thank you. Would you mind if I call you Mike --

A. Not at all.

Q. -- with the same preface that I said to Brad?

Mike, he could have made these phone calls from anywhere because he had a cell phone; isn't that right?

A. Correct.

Q. I mean, if he had decided to go camping up in the mountains of -- out there at Tooele, he still could have used his cell phone and made those calls?

A.. Correct.

Q. Isn't that right?

A. Yes.

Q. And the fact that he was using his cell phone, that was for his convenience; isn't that right?

A. Um, yes. And it worked both ways, for my convenience and his convenience.

Q. Well, if you wanted to really check up on him you could have required him to report to your house at 8:00 to make the calls and then to go to the particular stores, couldn't you?

A. I could have.

Q. But that would have required him get up at 7:00, because that's a drive from his house to your house; isn't

1 that right?

2 A. Correct.

3 Q. So, you allowed him to do that at his house to give
4 him that extra hour to do whatever he wanted to at home; isn't
5 that right?

6 A. It was a set-up so he could get -- you know, get
7 things done --

8 Q. Okay.

9 A. -- in a timely manner.

10 Q. And the same with the computer. You had the main
11 computer at your house, you could have required everything
12 done on that computer, but you got that computer for his house
13 so it would be easier for him; isn't that right?

14 A. Right. All that was done on that computer was what
15 you see today.

16 Q. Okay.

17 A. The schedule and the time sheets.

18 Q. Well, and when we look at P2 --

19 A. (Inaudible).

20 Q. -- which is the thing that shows the listing, this
21 was for the Fashion Place Mall; isn't that right?

22 A. Right.

23 Q. It doesn't have the Cottonwood Mall?

24 A. No.

25 Q. And it doesn't have the Crossroads Mall on here?

1 **A.** No.

2 **Q.** And you had other schedules for them, had you not?
3 Or were you not even doing schedules for them yet?

4 **A.** We hadn't started tracking them yet.

5 **Q.** Okay. And the reason that you really wanted to do
6 this tracking, as shown by this tracking report, is to get the
7 hours down because that shows when your sales are and when you
8 can put the emphasis on sales; isn't that right?

9 **A.** That's what we were trying to accomplish.

10 **Q.** And the daily sales numbers, I mean, that's
11 something you get off your bank deposit; isn't it?

12 **A.** Correct.

13 **Q.** Okay. Now, you indicated that in your mind he was
14 working. But it's fact, is it not, that also in your mind he
15 was driving to the Fashion Place to open up the store; isn't
16 that right?

17 **A.** This is correct.

18 **Q.** And he was taking the route that he would take
19 whether he was going to the Fashion Place to open the store or
20 going there to shop?

21 **A.** Correct.

22 **Q.** And in fact, I think he told us in his deposition
23 that sometimes during the day he did do personal things. And
24 you didn't have an objection to that, did you?

25 **A.** Not that I know of. I didn't know he was doing

1 personal things during the day.

2 Q. Well, but didn't you testify that sometimes he
3 called you and wanted you to work? And you said, "Well,
4 you're supposed to be doing the work". And I think your words
5 were, "Hot date"?

6 A. That's correct.

7 Q. So, he would sometimes not work because he had a hot
8 date or had something else on the schedule that he wanted to
9 do?

10 A. Yes. He was scheduled to work and then sometimes he
11 would call me and say, "Hey, would you mind working"? And
12 we'd go through the battle, and then sometimes I'd work,
13 sometimes I wouldn't.

14 Q. But all those things were really for his
15 convenience; isn't that right?

16 A. Correct.

17 Q. Now, you expected him to keep hours because you were
18 paying him on a salary; isn't that right?

19 A. That's right.

20 Q. I mean, when you said \$14.00 an hour, he didn't turn
21 in a time card that says, I worked 8:00 to 5:00, Monday to
22 Friday, so pay me \$14 an hour?

23 A. No, he did not.

24 Q. In fact, you didn't have any requirements, only that
25 he got the job done?

1 **Q.** Do you know when he went to sleep then?

2 **A.** No.

3 **Q.** What time would you have gone to sleep?

4 **A.** Midnight.

5 **Q.** Was he asleep by then or do you know?

6 **A.** I don't know. I go and close my door. I don't care
7 what time Brad goes to bed.

8 **Q.** You don't check the lights or anything like that?

9 **A.** No.

10 **Q.** Now, I should have asked Robert this, but there was
11 some testimony that you and Robert had checked phone records
12 that Brad had and couldn't find any records to indicate that
13 he had actually made the phone calls that morning. Do you
14 know anything about that?

15 **A.** I actually opened up his bills records, the phone
16 records, and purposely checked the dates to see if any phone
17 calls were made from his cellular phone that morning, and
18 there were not.

19 **MR. KANELL:** Okay. Thank you, that's all the
20 questions I have.

21 **REDIRECT EXAMINATION**

22 **BY MS. ATKIN:**

23 **Q.** I'm assuming there's no way you can check that on
24 the home phone.

25 **A.** Local calls would not show on our home phone, only

1 long distance calls would show record.

2 Q. Right.

3 A. That's why I checked his cellular phone to see if
4 any calls were made between the time he was at home and the
5 time he left the house.

6 Q. Okay.

7 A. And even during his travel.

8 Q. I understand that Brad has two different cellular
9 phones.

10 A. He did at the time.

11 Q. And were you able to check them both or do you --

12 A. Yes, I did. I checked both records.

13 Q. And there were just no phone calls made at all?

14 A. There were no phone calls that morning of
15 August the 1st.

16 MS. ATKIN: Oh, I'm sorry, you have a question? I
17 don't want to make you sit there uncomfortably.

18 THE COURT: That's okay. There was some confusion
19 in my mind as to what constitutes a local call, contrasting
20 the cell phone with the land line. When you make a call on
21 the land line to Salt Lake City, that's a local call?

22 THE WITNESS: That's long distance.

23 THE COURT: That's long distance. So, if he had
24 called somebody in Salt Lake, then that would have shown?

25 THE WITNESS: Yes.

1 **THE COURT:** But you didn't have that?

2 **THE WITNESS:** No.

3 **THE COURT:** Okay. If he had called on either one of
4 the cell phones, then that's the reverse, and the call to
5 Salt Lake City would have just been a local call; is that
6 right?

7 **THE WITNESS:** Yes.

8 **THE COURT:** Okay. So, if he had made a call to
9 somebody in Salt Lake City, that wouldn't have shown anyhow
10 because it wouldn't have been long distance; correct?

11 **MR. KANELL:** No, Your Honor.

12 **THE WITNESS:** No, all minutes are recorded.

13 **MR. KANELL:** Cell phones list any call. All minutes
14 are recorded, local, long, or any call.

15 **THE COURT:** Oh, okay. Thank you, I appreciate that.

16 **THE WITNESS:** Mm-hm.

17 **THE COURT:** And do you know the people that he would
18 have called? Would they have been in your area and been local
19 calls or would they have been long distance to Salt Lake?

20 **THE WITNESS:** It could have been any of the
21 employees, both long distance and local. I was never aware of
22 who Brad may have scheduled, so it would not have been my
23 business to know whether he was making a local or
24 long-distance call.

25 That's why I checked his phone records, to see if

1 anyone had spoken with Brad that morning. I wanted to speak
2 to the last person that had spoken to him to see.

3 **THE COURT:** And were some of those employees -- did
4 some of them live out in your area?

5 **THE WITNESS:** Yes.

6 **THE COURT:** And they would have been local calls?

7 **THE WITNESS:** Yes.

8 **THE COURT:** And just for the record, we've kind of
9 screwed it around but, Linda Higgins, you are the mother of
10 the petitioner in this case, Robert Brad Higgins?

11 **THE WITNESS:** I am.

12 **THE COURT:** No other questions. Any as a result of
13 mine?

14 **MS. ATKIN:** No, Your Honor.

15 **THE COURT:** Thank you. You may step down. Our next
16 order of business is going to be lunch?

17 **MS. ATKIN:** If that would be all right with you.

18 **THE COURT:** We'll take a lunch and come back.

19 **MS. ATKIN:** At 2:00?

20 **THE COURT:** Yeah.

21 (Lunch break was taken.)

22 **THE COURT:** Back on the record. All parties are in
23 place the time now is approximately 2:07.

24 Now, where did we leave off at? You rested, right?

25 **MS. ATKIN:** I rested, yes. I am done.

1 **Q.** And prior to that time had it been his kind of
2 sequence to come up to your house and sleep over on those
3 nights that he worked the late shift and then had an early
4 shift in the morning?

5 **A.** Yes, he would.

6 **Q.** And in fact, did you expect him to come in on
7 July 31st?

8 **A.** I asked him as I left work if he was going to, and
9 he said, "No".

10 So, I didn't expect him that night.

11 **Q.** Did he tell you why he was not coming in?

12 **A.** He didn't prepare to come to my house that night, he
13 didn't have his things.

14 **Q.** I thought you told me that he said that he had a
15 date or something?

16 **A.** No, I asked him. I said, "Are you coming over so I
17 know if I should make dinner?"

18 And he said, "I don't have my clothes". So --

19 **Q.** So he hadn't brought his clothes in. Now, there's
20 been some talk about him working on the computer to do
21 schedules.

22 **A.** Mm-hm.

23 **Q.** And Mike had actually said that you guys found the
24 schedule for the week of July 31st, but now it doesn't look
25 like we have found it.

1 **A.** No. That's the last schedule Brad made.

2 **Q.** Okay. I want to just show you this. And I'm just
3 going to have her verify this.

4 **MS. ATKIN:** The one that we just looked at?

5 **THE COURT:** This would be Respondent's No. 2,
6 single-paged document. It appears to be a schedule.

7 **Q. (by Mr. Kanell)** Let me show you what's been marked
8 as Respondent's Exhibit No. 2. But he's marked it No. 1.

9 **THE COURT:** Whoops. I was looking at 1.

10 **Q. (by Mr. Kanell)** Is that a document that's brought
11 here from the business today?

12 **A.** Yes.

13 **Q.** And that shows the scheduling that Brad would do on
14 a weekly basis?

15 **A.** Yeah. This is Brad's handwriting on the schedule.

16 **Q.** So when we talk about this scheduling being done on
17 the computer, at least it appears to me that really the
18 computer just printed out a little form, and it looks like he
19 hand wrote in the times; is that right?

20 **A.** Yeah. Because everyone changed so much, that we
21 have to fix everything.

22 **Q.** Well, I note that we don't see much erasing marks on
23 there, they seem to be done in pencil.

24 **A.** Yeah.

25 **Q.** You don't see many changes on that one, do you?